Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 103 of the STELA Reauthorization Act of 2014	)	MB Docket No. 15-216
	)	
	)	
Totality of the Circumstances Test	)	

To: The Commission
Attn: Secretary

COMMENTS OF SAGA BROADCASTING, LLC

Saga Broadcasting, LLC ("Saga"), the licensee or parent of television stations KOAM-TV, Pittsburg, KS and KAVU-TV, Victoria, TX, hereby submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") in the captioned proceeding. The bottom line is that, in Saga's experience, the retransmission consent process works and does not need any adjustment. That is, the existing "totality of the circumstances" test for determining whether local television stations and multichannel video programming distributors ("MVPDs") are negotiating for retransmission consent in good faith presently is weighted evenly. But if the proposals set forth in the NPRM were adopted, the scales would be unfairly tilted in favor of MVPDs at the expense of local television stations. Indeed, the NPRM is so one-sided in its approach that it appears to have been drafted directly from the MVPDs' holiday "wish list."

BACKGROUND

Each week in the Joplin, MO/Pittsburg, KS market, Saga's KOAM-TV provides 19 hours of unique live local news, weather and sports programming. The station also regularly interrupts regular programming to provide necessary safety information during weather emergencies. During the past year, KOAM-TV aired over 200 hours' worth of Public Service Announcements on a wide variety of issues. The station has earned many awards from the Kansas and Missouri Broadcasters Associations, include Best in State for Investigative Reporting, Sports, Spot News, News Series and Weather. KOAM-TV also was recognized by the Kansas Special Olympics with their highest honor, "Business Partner of the Year."

KOAM-TV also has created several special events, including Toy Box, where the station collects new toys from across the market and distributes them to needy children. In addition, every day for the past ten years, a new military veteran is featured on the station's daily newscasts and appears on its website. The station has bestowed this honor to nearly 10,000 veterans in the area.

In Victoria, Texas, Saga's KAVU-TV provides 22 hours of local news each week, as well as program interruptions to deliver emergency information. KAVU-TV is the sole source of such news and weather coverage to viewers within a 100 mile radius. KAVU-TV is heavily involved with several charity projects, including Pay it Forward, which gives cash to local citizens and allows them to pay it forward to a the non-profit of their choice, as well as Pack the Bus, which provides school supplies for underprivileged local students. KAVU-TV, in conjunction with the League of Women Voters, also provides live forums during political seasons for local and regional politicians to discuss issues affecting the community.

KOAM-TV is distributed to 20 different MVPDs in the Joplin, MO market. It is interesting to note, however, that Saga negotiates with only about half of them, as many of the local MVPDs have elected to engage in joint negotiations – the very action that so many MVPDs (and the Commission) have found repugnant.[1] In the Victoria, Texas market, Saga's KAVU-TV is carried by one local MVPD, plus DirecTV. In the past 20 years, for as long as Saga has owned these

[1] The Commission has prohibited joint negotiations among certain local television stations located in the same market. *See Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351 (2014).

stations, there is not one instance where either of Saga's stations have been removed from carriage by any of its partner MVPDs due to a retransmission consent dispute.

Thus, from Saga's standpoint, the retransmission consent system in place does not need to be upset, as it involves bargaining between equal capitalistic forces. Government intervention is not required, because neither side is exerting undue market power over the other. In drafting what ultimately became the STELA Reauthorization Act of 2014, the Senate Committee on Science, Commerce and Transportation stated that the Commission's "totality of the circumstances" rulemaking should be updated so that the test would "...take a broad look at all facets of how **both television broadcast station owners and MVPDs** approach retransmission consent negotiations to make sure that the tactics engaged in by both parties meet the good faith standard set forth in the Communications Act."[2] But the NPRM makes plain that the Commission is not interested in an equal playing field. Instead, the Commission seeks authority to place its thumb on the scale, favoring MVPDs.[3]

The provision of television service to local viewers involves a series of symbiotic relationships. Local television stations have the technical capability – and the licenses issued by

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[2] Report of Senate Committee on Science, Commerce and Transportation, at 13 (emphasis added).

[3] This is not the only proceeding in which the Commission seeks to disfavor broadcasters at the expense of other communications providers. Following the end of the "voluntary" incentive auction, whereby a television station may elect to surrender all or part of its 6 MHz slice of spectrum, the Commission intends to "repack" all of the nationwide television stations into a much smaller swath of spectrum than presently is available *See* wireless.fcc.gov/incentiveauctions/learn-program/repacking.html. And as part of the auction process itself, the Commission has proposed setting aside up to two channels in every TV market for Wi-Fi and other unlicensed wireless services, which could interfere with the ability of local stations to implement mobile technology, plus a host of other problems. *See, e.g.*, www.tvnewscheck.com/article/90135/broadcasters-fear-fcc-vacantchannel-plan. And questions abound as to whether there will be a sufficient amount of resources and funds available to local television stations to accomplish the spectrum repack in the 39-month period proposed by the Commission. *See, e.g.*, www.tvnewscheck.com/article/90115/fcc-repack-wont-force-stations-offair. Yet another proceeding, which was placed on circulation and then withdrawn by Chairman Wheeler, would have eliminated the network non-duplication and syndicated exclusivity rules, to the potential detriment to local television stations. Those rules prevent an MVPD from importing an out-of-market station and dropping an in-market station from carriage. Keeping such rules on the books remains a key component in fair retransmission consent negotiations; without them, in a retransmission consent dispute, an MVPD could simply cease negotiations and import another station, which runs contrary to Congressional intent.

the Commission – to deliver content that viewers want to watch. Local television stations, such as KOAM-TV and KAVU-TV, also deliver local news, in many cases multiple times per day. And local news is extremely popular.[4] For many years, the only way that television networks could distribute their content was by partnering with local stations. In those days, a television network paid its local station affiliate in order to carry the network's programming.

As the number of MVPDs expanded (the concept that there could be 20 MVPDs available in a market the size of Joplin, MO would have been unthinkable as recently as the mid-1990s), the television networks recognized that there were additional ways to distribute their content. So the tide shifted: instead of networks paying local stations to distribute their programming, the local stations began paying the networks for the right to that programming. Because of the popularity of local television stations (especially because of their local news programs and their unmatched ability to promote network programming in their local communities), the national networks still desire the network/affiliate relationship. But the networks now insist on the payment of fees from local stations.

MVPDs rely on subscribers. Not only for the monthly fees that the subscribers pay, but also because the more subscribers an MVPD has, the more easily it can sell advertising time on its own channels. In order to attract subscribers, MVPDs crave content. And the most popular content is held by the national television networks, which distribute programming to the local television stations, whose signals are, in turn, carried by the MVPDs. Shortly after the seismic shift in the network/affiliate relationship, where revenues now flow from the local station to the network, local stations began receiving compensation from MVPDs in exchange for carriage and access to the

[4] Seventy percent of all viewers nationwide tune into their local stations for local news during the course of an average month. *See* www.journalism.org/2013/10/11/how-americans-get-tv-news-at-home.

valuable programming that MVPDs could then offer to their customers.[5] Such a relationship makes sense: the MVPDs also willingly compensate non-broadcast networks such as AMC, HBO and ESPN for their popular content. Local television stations need compensation from MVPDs in order to make payments to the broadcast networks, as most local television stations would be unable to make such payments solely by relying on revenues received from local and national advertisers.

To recap, **viewers** who want to watch network programming need the local stations to deliver such programming; **local stations** seeking to deliver the most popular programming need the networks to provide such programming; **MVPDs** seeking subscribers need the local stations, which carry the most popular programming available to subscribers; and the **networks** need the local television stations because the local stations are able to promote the network programming on the local stations' own popular programming, such as its daily and nightly newscasts. Thus, the existing system is a win for networks, a win for MVPDs, a win for local stations and a win for viewers.

In contrast, any upset to this delicate balance could result in a lose-lose-lose-lose situation. If, as proposed by the NPRM, the scales of retransmission consent negotiations were tilted in favor of MVPDs, such that the local stations did not earn sufficient revenues, then the local stations would be unable to make payments to the national networks and could significantly curtail the local stations' ability to effectively produce local news and public affairs programming that is so vital to the public. In turn, the national networks would be forced to find alternative sources to deliver its programming, and viewers would be forced to scramble to find their favorite shows

[5] The programs carried by local stations are inarguably the most popular programs that exist in the United States. Forty-seven of the top 50 most-watched series during the 2014-15 season originated on the national broadcast networks. *See* www.tvinsider.com/article/1989/top-50-tv-shows-2014-2015-highest-rated-winners-and-losers.

from some other source. Indeed, the networks, without the payments from the local television stations, could cease producing expensive programming altogether. This losing situation is avoidable, if the Commission simply retains the existing retransmission consent rules and refrains from unnecessary tinkering.

ANSWERS TO SPECIFIC QUESTIONS SET FORTH IN THE NPRM

The NPRM asks a number of questions, seeking comment on a wide variety of proposals. Because it is Saga's belief that no changes are necessary to the "totality of the circumstances" test, many of the questions set forth in the NPRM have been answered as set forth above. However, certain questions warrant a response and/or additional explanation, as follows:

1. **Does the current process for filing bad faith allegations based on the totality of the circumstances test help promote *bona fide* negotiations and protect consumers? (NPRM at ¶7).**

The problem with allowing either party to file a complaint based on "bad faith" is that negotiations are conducted the same way that children negotiate for a pack of gum on the playground. For instance, if a local station has established as its floor a retransmission consent fee from an MVPD of $1.50 per subscriber, it cannot submit that $1.50 offer to the MVPD and hold firm; otherwise, it will be accused of not negotiating in good faith. So instead, the station and the MVPD engage in a game: the station prepares an offer of $2.00 per sub, and the MVPD counteroffers with an offer of $1.01 per sub. Then the station offers $1.99 per sub. The parties go back and forth, one penny at a time, like schoolchildren playing a game, until finally there is agreement at $1.50. This system is inefficient. Holding firm on a price term is not negotiating in bad faith if that price term is at a "market" level.

2. **Should the Commission require local stations and MVPDs to publish and make available in their public files "rate cards" or other information about the retransmission consent rates charged in a given market? (NPRM at ¶8, note 43).**

No. This information is proprietary. And every local station/MVPD relationship is different. Saga submits that none of the MVPDs carrying its stations would want Saga to know the rates that such MVPDs are paying to other local stations in the same market. Indeed, the deck already is stacked in favor of national MVPDs, such as Dish Network and DirecTV, as they already know the prices that they are paying to each local station in a given market, whereas the local stations have to guess as to what the "market rate" actually is.

3. **Should local stations be permitted to prevent MVPD consumers' online access to the station's programming "as an apparent tactic to gain leverage in a retransmission consent dispute?" (NPRM at ¶13). How should an MVPD's demand for online distribution rights, or a broadcaster's refusal to grant such rights, be treated under the totality of the circumstances test? (NPRM at ¶19). May a broadcaster "demand" that an MVPD pay a per-subscriber fee even for subscribers that receiver the station's signal through its Internet or voice service? (NPRM at ¶16 (iv)).**

If an MVPD refuses to pay for the local station's content and signal, such that it is prevented under copyright law from making the station available to its customers on its traditional, in-home video system, then it follows that the MVPD also should not be permitted to circumvent this prohibition by enabling its same customer to access the station's programming online. The comments of the myriad MVPDs, listed at Note 56 to the NPRM, represent a transparent effort to obtain a local station's content through the back door, without paying for it, in the event that retransmission consent negotiations bog down.

It is as if the MVPDs view a local station's content distributed online as somehow different, or less valuable, than the content distributed to a traditional television or set-top box. But as the Commission is well aware, viewers increasingly are able to access a local station's content through alternative means. Indeed, the very purpose of the broadcast incentive auction is to take spectrum away from local television stations, but make the content produced by the stations available to viewers through online subscriptions with MVPDs or other carriers.

A local station's content distributed online is the same, and has equal value, as the local station's content carried by MVPDs in the more traditional sense. Accordingly, a local station absolutely should be able to prevent MVPD customers from accessing the station's online content unless that MVPD is providing compensation to the station. And the Commission does not have the authority either to force a local station to make its content available online to anyone or to prevent access to any party unwilling to pay for it.

Moreover, a local station also is entitled to compensation from an MVPD if an MVPD's customer is able to access the station's signal online, even if that customer does not have traditional "cable tv" service. Simply put, subscribers are subscribers. And if any MVPD subscriber receives a local station's programs through an MVPD offering, the MVPD must provide consideration to the local station.

4. Would it be appropriate for a network to negotiate on behalf of its affiliates? (NPRM at ¶14).

Although Saga's television network partners do not negotiate retransmission consent on behalf of Saga's stations, Saga believes that there is nothing wrong with such an arrangement. If the station informs the network what its price per subscriber floor is, and the network is able to obtain at least that price (if not higher), then the station has not abdicated any responsibility. The "good faith" standard is not implicated solely because a party other than a local station is conducting the negotiations; it arises only if that party is not acting in accordance with the Commission's rules.

5. How should a local television station's "insistence" on bundling broadcast signals with other broadcast stations or cable networks into the retransmission consent agreement be treated under the totality of the circumstances test? (NPRM at ¶15). Can a local station "insist" that the agreement expire prior to a marquee sports or

entertainment event? (NPRM at ¶16 (i)). Can a local station insist on a channel position or tier placement? (NPRM at ¶16 (ix).

An independent reader of these questions would assume that the MVPDs are poor, downtrodden companies that lack any market strength whatsoever – that they are being beaten up on by the allegedly "big, bad" local television stations in the course of negotiations. Nothing could be further from the truth. Cablevision, one of the MVPDs seeking retransmission consent "reform," has a market capitalization of more than $8 billion. DirecTV has a market cap of more than $47 billion. Cox Enterprises' market cap is north of $17 billion. Mediacom's is more than $600 million. On the other hand, Saga's market cap is only about $250 million, and most of its revenues and assets are generated from its radio stations.[6] Any insinuation that the extremely well-heeled MVPDs are somehow being mistreated at the hands of local television stations must be dismissed out of hand.

With respect to a local station's "insistence" on the actions set forth in this section, apart from the tone that improperly paints the local station as the aggressor and the MVPD as the victim, the Commission (and the MVPDs) must recognize that such actions comprise a portion of the overall negotiation process that is a part of the fabric of the capitalist system in the United States. Saga does not engage in the type of "bundling" that the MVPDs seem to ironically fear,[7] but if an MVPD opposes such practice (or the proposed contract termination date or channel positioning), it would be addressed during the course of negotiations. There is nothing that the Commission should do to interfere with such negotiations.

6. Should a local station be permitted to prevent an MVPD from temporarily importing an out-of-market signal in cases where the local station has prevented access to its

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[6] Saga owns approximately 100 radio stations, but just two full-power television stations.

[7] This fear is ironic given the MVPDs' long-standing opposition to allow consumers access to MVPD channels on an "a la carte" basis, which would allow a viewer to pay for only the channels he/she desires. Instead, a typical MVPD customer is required to purchase a bundle of all channels on a given tier, without an opportunity to de-select any of them.

signal by the MVPD after the expiration of the retransmission consent agreement? (NPRM at ¶16 (ii)).

Of course. This is why the syndicated and network non-duplication exclusivity rules exist, and why they are crucial. These days, the technology exists for any MVPD to capture the signal of any station nationwide and make it available for viewing by its customers. The copyright rules present a relatively minimal financial impediment to such practice. Without the exclusivity rules, an MVPD would be free to negotiate with only a handful of local stations nationwide and provide their signals to all of its markets. This would enable only that handful of stations to reap a financial windfall and leave hundreds of other stations out in the cold. As explained above, the delicate balance that exists today, which delivers the most popular programming to viewers, such as local news, depends on the maintenance of the existing system. The Commission must not upset this apple cart.

CONCLUSION

For the reasons set forth herein, Saga respectfully submits that no changes are necessary to the "totality of the circumstances" test or any other aspect of the current retransmission consent negotiation process.

Respectfully submitted,

SAGA BROADCASTING, LLC

By:________________________

Gary S. Smithwick
Mark B. Denbo
Its Attorneys

Smithwick & Belendiuk, P.C.
5028 Wisconsin Avenue, N.W., Suite 301
Washington, DC 20016
(202) 363-4050

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